BURLINGTON HOUSING BOARD OF REVIEW

Monday, November 2, 2020

7:00 p.m.

The meeting will be entirely remote and virtual. You can join the meeting via Zoom:

https://us02web.zoom.us/j/82798381985?pwd=YnFhaWNwd01XNXppNnlBQ01ib1hVZz09

Passcode: 013784

Or iPhone one-tap :

US: +13126266799,,82798381985#,,,,,,0#,,013784# or +19292056099,,82798381985#,,,,,,0#,,013784#

Or Telephone:

US: +1 (312) 626-6799 or +1 (929) 205-6099 or +1 (301) 715-8592 or +1 (346) 248-7799

Webinar ID: 827 9838 1985

Passcode: 013784

International numbers available: https://us02web.zoom.us/u/kiNSD64Lf

AGENDA

1. Discussion of proposed minimum housing form (tabled from meeting of 10/19/20)

2. Joshua Prawdzik (tenant); Great Cedars (landlord) (security deposit case) re: 191 College St, Apt. 308 (rescheduled from meeting of 10/5/20)

3. Alison Hall, Mark Ehler (tenants); June LeClair (landlord) (security deposit case) re: 406 So. Union Street, Apt. 1

4. Hannah Ankerson, Julia Deziel, Maggie Dwyer, Anna Humphreys (tenant); Susan Linnell (landlord) (security deposit case) re: 241 So. Winooski Ave

5. Brenda Brazier (tenant); 316 Flynn LLC (landlord) (security deposit case) re: 316 Flynn Ave., #211

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Minutes

Board Members present: Josh O'Hara, Betsy McGavisk, Patrick Murphy, Olivia Pena and Charlie Gliserman

Staff present: Lisa Jones

1. Discussion of proposed minimum housing form (tabled from meeting of 10/19/20)
   Present: Patti Wehman, Permitting & Inspections (P&I)
   O'Hara: P&I has offered to do training for Board. Gives possible dates.
   Wehman: To be clear, this is a training: go through ABC's of inspections and complaints (the process). If Board submits questions they have beforehand, it will be easier to make sure we address what Board wants to know. Content of current draft of form looks good – would like to share with team for feedback.
   Pena asks about scheduling training after hours.
   Board decides noon on Wed. will work for all.
   O'Hara: go ahead and circulate form to P&I team.
   O'Hara moves to table item to next meeting. Murphy seconds. All vote yes.

2. Joshua Prawdzik (tenant); Great Cedars (landlord) (security deposit case) re: 191 College St, Apt. 308 (rescheduled from meeting of 10/5/20)
   Present were: Joshua Prawdzik, Victoria White, Mac Stevens; all were sworn in. Board takes evidence and testimony from both parties and concludes hearing.

3. Alison Hall, Mark Ehler (tenants); June LeClair (landlord) (security deposit case) re: 406 So. Union Street, Apt. 1
   Present were: Alison Hall, June LeClair, Sherry LeClair; all parties were sworn in. Board takes evidence and testimony from both parties and concludes hearing.

4. Hannah Ankerson, Julia Deziel, Maggie Dwyer, Anna Humphreys (tenant); Susan Linnell (landlord) (security deposit case) re: 241 So. Winooski Ave
   Present were: Maggie Dwyer, Carolyn Dwyer, Hannah Ankerson, Anna Humphreys, Julia Deziel, Susan Linnell, Zach Cook; all were sworn in. Board takes evidence and testimony from both parties and concludes hearing.

5. Brenda Brazier (tenant); 316 Flynn LLC (landlord) (security deposit case) re: 316 Flynn Ave., #211
   Present were: Brenda Brazier, Glenn Von Bernewitz; all were sworn in. Board takes evidence and testimony from both parties and concludes hearing.

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of Hannah Ankerson, Julia Deziel, Maggie Dwyer and Anna Humphreys Regarding Withholding of Security Deposit by Susan Linnell for Rental Unit at 241 So. Winooski Ave., #2	**)**	**Security Deposit Appeal**

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on November 2, 2020; the hearing was held virtually via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Murphy, Olivia Pena, Charlie Gliserman and Betsy McGavisk were also present. Petitioners Maggie Dwyer, Hannan Ankerson, Julia Deziel and Anna Humphreys were present and testified. Respondent Susan Linnell was also present and testified. Also appearing and testifying were Carolyn Dwyer and Zach Cook.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent Susan Linnell is the owner of a rental unit, 241 So. Winooski Avenue, #2, in the City of Burlington which is the subject of these proceedings.

2. Petitioners Hannah Ankerson, Julia Deziel, Maggie Dwyer and Anna Humphreys moved into the rental unit with a written lease which ran from May 15, 2020 to August 13, 2020. Monthly rent was $2300.00.

3. Petitioners paid a security deposit of $2300.00 to respondent. Petitioners were to receive back their security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioners vacated the apartment on August 13, 2020.

5. On August 20, 2020, respondent sent, by certified mail, a packet of information to petitioner Maggie Dwyer (as the point person for all the tenants), including a written statement of deductions from the security deposit. Said statement itemized deductions of $1161.70 from the deposit. Interest in the amount of $3.45 was credited to the deposit and there was a $25 credit for "cubes/hanging thing left for new tenants." The statement indicated that $1166.75 was being returned to petitioners. There was no check included in the packet of information.

6. Petitioners disputed the deductions as being unfair and argued that respondent's failure to return the deposit was willful. Respondent deducted a total of $614.33 for cleaning (including carpet cleaning), $250 for repairs, $22 for garbage, $242.87 for utilities, $5 for certified mail fee and $27.50 for ¼ of Burlington's apartment registration fee. Petitioners testified that they spoke to some of respondent's former tenants who claimed respondent had a history of claiming she had returned a deposit when she didn't. Petitioners believe respondent never intended to include the check in their packet.

7. Respondent denied that the deductions were unfair or not valid ones. When questioned by the Board about some of the deductions, such as the certified mail fee and apartment registration fee, respondent stated she believed the deductions to be allowed under city ordinance; she also testified that an attorney had reviewed her leases several times and never questioned any provisions contained in it. However, after this case was adjourned, respondent failed to leave the hearing or mute her microphone and was heard saying, "looks like I did have stuff in the lease…in the accounting that wasn't supposed to be there."

8. Respondent denied that the deposit was willfully withheld; she did not know petitioners hadn't received a check until she received the filing information from the Board.

Petitioners confirmed that they did not tell respondent the check was not included in the packet they received from her. Respondent testified it is not her practice to confirm that a tenant has received a check or to reconcile her accounts to confirm that a check has cleared her bank (even though she pointed out that because she has an MBA she provides tenants with a very detailed accounting of "where the money goes").

Conclusions of Law

9. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

10. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

11. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. <u>See</u>, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e).

12. A landlord who decides to retain all or part of a security deposit must comply with 3 specific requirements of the ordinance: the deposit must be returned within 14 days of the date the tenant vacated or abandoned the rental unit with a written statement itemizing any deductions; the statement must contain notice of the tenant's right to appeal to the Housing Board of Review; and the statement must be hand-delivered or sent by certified mail.[1] See *Lieberman v. Circe*, No. S21-13 Cncv (Crawford, J., March 27, 2013) and Minimum Housing Code Sec. 18-120(c). The Vermont Supreme Court required the literal enforcement of these requirements in *In re Soon Kwon*, 189 Vt 598 (2011). Accordingly, a landlord who fails to meet all of these requirements forfeits the security deposit. None of petitioners' deposit was returned to them even though respondent's accounting indicated that $1166.75 was being returned. It is a landlord's responsibility to ensure that a deposit is returned. As petitioners' deposit was not returned to them within 14 days of the vacant date, the Board concludes respondent forfeited the right to withhold any part of the deposit.

13. If the failure to return a deposit within 14 days is willful, the landlord is liable for double the amount wrongfully withheld. Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e). Petitioners argued that respondent's failure to return the deposit was willful; in fact, petitioners believed that respondent never intended to send a check. Respondent did not know the check wasn't received (though, arguably, she should have known) and petitioners did not contact her about it. Based on the evidence, the Board concludes the deposit was not willfully withheld.

Order

Accordingly, it is hereby ORDERED:

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[1] An amendment to Sec. 18-120(c) removing the "certified mail" requirement took effect on January 7, 2015.

14. Petitioner Maggie Dwyer (on behalf of all the tenants) is entitled to recover from respondent Susan Linnell the following amounts:

a) $2303.45, the amount of the security deposit (including interest) improperly withheld after August 27, 2020; and

b) Additional interest of $.01 per day from August 28, 2020 until such date as the amount improperly withheld is returned to petitioner.

DATED at Burlington, Vermont this 10th day of December, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara

/s/ Olivia Pena
Olivia Pena

/s/ Charlie Gliserman
Charlie Gliserman

Concurring opinion

Although we, Patrick Murphy and Betsy McGavisk, concur with the conclusions reached by the majority, we wish to highlight additional findings of potential importance to future cases involving this or other respondents.

The Board has held in prior cases that the withholding of a certified mail fee from a security deposit is unlawful, as it is not among the four (4) legitimate charges provided for in Section 18-120(c) of Burlington's Minimum Housing Code:

1. Damage beyond normal wear and tear to the premises which is attributable to the tenant
2. Nonpayment of rent
3. Nonpayment of utility charges
4. Expenses required to remove from the rental unit articles abandoned by the tenant

Similarly, this Board has established precedent finding that an *automatic* cleaning charge like the carpet cleaning charge described in this lease is not an allowable deduction—that any amount withheld must reflect the *actual* cost of damage which exceeds the "normal wear and tear" standard.

Lastly, this Board has found that withholding a "rental registration fee" is not an allowable deduction from a tenant's security deposit. Beyond the fact that the lease itself has marked the charge "N/A" presumably not applicable in this case, and that this fee is not among the four allowable charges, the ordinance does not seem to have contemplated a landlord passing this fee along to a tenant or tenants. Section 18-15(a) calls for "the owners of all rental units subject to inspection pursuant to Section 18-16 shall be required to annually file a registration application and fee with the enforcement agency, which shall be due annually on or before April 1." Section 18-30(a) elaborates further: "*Registration fee.* Pursuant to Section 18-15, a registration fee shall be charged to the owner of every rental unit in the city that is subject to periodic inspections."

The respondent in this case testified during the hearing that she has charged these fees during the many years she has operated as a landlord in Burlington, while acknowledging after the hearing that some or all of these should not have been withheld. Given the respondent's testimony, as well as her experience chairing this Board in the past, any future cases involving this respondent and questions of "willful withholding" should consider these facts.

/s/ Patrick Murphy
Patrick Murphy

/s/ Betsy McGavisk
Betsy McGavisk

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of BRENDA BRAZIER	**)**	
Regarding Withholding of Security Deposit	**)**	**Security Deposit Appeal**
By 316 FLYNN LLC for Rental Unit at	**)**	
316 Flynn Avenue, #211	**)**	

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on November 2, 2020; the hearing was held virtually via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Murphy, Olivia Pena, Betsy McGavisk and Charlie Gliserman were also present. Petitioner Brenda Brazier was present and testified. Respondent 316 Flynn LLC was represented at the hearing by Glenn Von Bernewitz who testified.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent 316 Flynn LLC is the owner of a rental unit, 316 Flynn Avenue, Apt. 211, in the City of Burlington which is the subject of these proceedings. Glenn Von Bernewitz from Redstone manages the property.

2. Petitioner Brenda Brazier moved into the rental unit with a written lease which ran from June 1, 2018 to May 31, 2019. On March 25, 2019, the parties extended the lease to June 30, 2020 at which time it expired. Monthly rent was $1115.00.

3. Petitioner paid a security deposit of $1115.00 to respondent. Petitioner was to receive back her security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioner did not move out of the unit on June 30, 2020 when the lease expired, but stayed an additional month as the unit into which she was moving wasn't available. On July 27, 2020, petitioner gave notice to respondent that she was vacating the unit by July 31, 2020. Petitioner moved out of the unit on August 1, 2020.

5. On August 10, 2020, respondent sent petitioner an itemized statement in accordance with ordinance requirements. Said statement itemized deductions of $2980.00 from the deposit for unpaid rent and damages. Interest in the amount of $1.41 was credited to the deposit.

6. Both parties testified with respect to unpaid rent. Petitioner argued that she was charged double for July rent. Petitioner paid her rent for July, but the itemized statement indicated a deduction of $1115.00 for rent obligation.[1] Glenn Von Bernewitz pointed to the lease provision which states:

> In the event that the Tenant holds-over beyond the expiration date of this lease, then this Lease shall continue as a month-to-month tenancy at a rental rate that is 200% of the rental rate in effect during the term immediately preceding the holdover, terminable upon thirty (30) days written notice by either party.

The lease expired on June 30, 2020. Petitioner continued living in the unit until August 1, 2020. Therefore, according to Mr. Von Bernewitz, petitioner was liable for the "hold-over" rental rate of $2230.00, for both July and August. As petitioner only paid $1115.00 for rent in July (rather than $2230), there was unpaid rent of $1115.00 which was deducted from the deposit. (Respondent did not charge petitioner for rent for August.)

Conclusions of Law

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1 The statement also noted a rent obligation for August 2020, but the charge was credited back.

7. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

8. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

9. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e). Proper notice was provided.

10. City ordinance allows a deposit to be withheld for nonpayment of rent. Minimum Housing Code Sec. 18-120(c). Petitioner's lease expired on June 30, 2020, but she did not move out. Rather, petitioner lived in the unit until August 1, 2020. The written lease, signed by petitioner, is clear that a tenant who holds over beyond the expiration of the lease continues with a month-to-month tenancy with a rental rate that is

200% of the rental rate in effect during the term immediately preceding the holdover. When petitioner stayed in the unit after the lease expired she was subject to a new rental rate of $2230.00 per month. Petitioner paid $1115.00 for rent for July. Therefore, it was proper for respondent to withhold $1115.00 of the deposit for nonpayment of rent.

11. The dissent contends that the clause in the lease here creating a "month-to-month tenancy at a rental rate that is 200% of the rental rate in effect during the term immediately preceding the holdover" is an unlawful penalty on the Tenant. The dissent is mistaken. The principal case relied upon by the dissent, Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313, 597 A.2d 1280 (1991), discusses how Vermont courts determine whether a damages clause in a contract is a liquidated-damages clause or whether it is a penalty-creating clause. But that case has no usefulness for this matter because the damages versus penalties question is reserved for the breach of a contract, not what happens after a lease has expired and a tenant has held over. See Restatement (Second) of Contracts §§ 344-45, 356 (explaining that remedies enforce the expectation interests of the contracting parties, who may build into contracts the amounts of money damages available for a breach, but who may not build in amounts that penalize one another for a breach). Although the Tenant here may have breached her month-to-month hold-over lease by nonpayment of rent, she did not breach the immediately-preceding lease agreement, where one finds the 200% rent clause. Because there was no breach of that lease agreement, the question of damages is irrelevant.

12. Instead, the Tenant stayed beyond the term of the lease. As they are entitled to do, the parties bargained for this occurrence: holding over created a month-to-month lease terminable upon 30 days' notice at 200% of the previous rent. Restatement

(Second) of Property, Landlord & Tenant § 14.4(b). Presumably, in exchange for increased rent, the Landlord has forgone the power to terminate the lease in 14 days and the right to sue for ejectment, which can have profoundly negative effects on a tenant. 9 V.S.A. §§ 4467-68; 12 V.S.A. § 4851; and see In re McCarty, 2013 VT 47, ¶ 6, 194 Vt. 109, 75 A.3d 589 (observing because of tenant's sudden eviction, she suffered serious emotional and physical consequences, including post-traumatic stress disorder and intermittent homelessness) (quotations removed). The clause is neither a damages nor a penalty clause; it is a clause describing the terms of the hold-over rental.

13. For these reasons, the dissent is mistaken. As the dissent rightfully explains below, it is unseemly (at minimum) for the rent to double if a tenant (especially one who is a Burlington Housing Authority client) holds over during the COVID-19 pandemic. However, the Landlord's actions and the lease term were lawful.

Order

Accordingly, it is hereby ORDERED:

14. Petitioner Brenda Brazier's request for relief is DENIED.

DATED at Burlington, Vermont this 10th day of December, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara

/s/ Olivia Pena
Olivia Pena

/s/ Charlie Gliserman
Charlie Gliserman

We, Patrick Murphy and Betsy McGavisk, respectfully dissent from the majority's opinion.

We begin our dissent in this case by noting what has been omitted from the majority decision in its "Findings of Fact." First, several charges were applied as deductions from the petitioner's security deposit. These are admittedly difficult to parse out because of the respondent's lack of clarity and precision with their accounting, but they are as follows:

- "Holdover rent" for July 2020: **$1115**
- "Late fee" for July 2020: **$50**
- Pro-rated rent for one day in August (Aug 1st): net **$35.97** (Redstone invoiced for the entire month + late fee, but credited back 30 days and the late fee. This "rent" was calculated at the normal rental rate of $1115.)
- Cleaning fee: **$150**
- Carpet cleaning fee: **$125**
- Painting fee: **$100**
- Damage fee for burnt outlet and hole in door: **$275** (invoice submitted for $135 for the outlet, but no invoice for the door)

Total damages assessed by the respondent were therefore **$1850.97**, to which the respondent applied the petitioner's security deposit with interest ($1116.41) resulting in a "balance due to landlord" of **$734.56**.

Even if the deduction for "holdover rent" were upheld as permissible--we contend that it is not--the majority should have considered the validity of all of these charges. If none of the others were deemed legitimate deductions, the respondent would be entitled to at least the interest on her security deposit. We will therefore first address the question of the various "damages," before returning to the most critical issue of "holdover rent."

In *Mongeon Bay Properties, LLC v. Mallets Bay Homeowner's Ass'n*, the Vermont Supreme Court elaborated on the contours of the normal-wear-and-tear concept. The Court explained that the analysis will examine: 1) whether the tenant made reasonable use of the property; 2) the type of property, as well at its context and use; and 3) whether the tenant took reasonable steps to avoid damage to the property. 2016 VT 64, ¶¶ 32-37, 202 Vt. 434, 149 A.3d 940. Based upon the evidence provided by the landlord in this case, I find the deductions for "cleaning," "carpet cleaning," and "painting" to be unwarranted. Scuff marks and a couple of tacks/minor holes do not rise above the standard of "normal wear and tear." Indeed, a painting invoice which included the tenant's unit among many others seems to suggest that these expenses are routine and to be expected as the cost of doing business. The landlord also failed to demonstrate how the damage for the "burnt outlet" was caused by the tenant's negligent use of the premises, nor was an invoice provided for the "hole in door." To the contrary, the tenant submitted evidence documenting several issues shared by other tenants with the development itself, as well as her move-in checklist which noted paint on the door and other marks within the apartment. We find these deductions ($135 for the outlet, and what can only be assumed as $140 for the door) to be unreasonable.

In communications submitted to the Board as evidence, the petitioner does acknowledge that she was not able to move out at the end of July 2020, instead handing over possession of the unit on August 1, 2020. For this one day, the respondent has prorated rent for the month of August to $35.97, or 1/31 of the rental rate of $1115. We find this withholding to be reasonable.

Lastly, we will consider the two charges from July--"holdover rent" of $1115 and a "late fee" of $50--and whether they are permissible deductions from the tenant's security deposit. In the recent past, this Board has held that a late fee is not an allowable deduction, as Section 18-120(c) of Burlington's Minimum Housing Code is clear on what the landlord can withhold: "After the rental unit is vacated or abandoned by the tenant(s), the owner may retain all or part of the deposit plus interest for the actual cost to repair damage beyond normal wear and tear which is attributable to the tenant in order to maintain the condition and habitability of the unit, for nonpayment of rent, for nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility, and for expenses required to remove from the rental unit articles abandoned by the tenant." Particularly in this case, where the late fee is linked to the "holdover rent" charge, we find the amount of the late fee to be wrongfully withheld.

It is a fact that the tenant stayed in the apartment a month and one day beyond the term of her lease. It is also a fact that the lease includes language which provides for a $50 late fee, as well as a "rent escalation" of 200% if a tenant stays beyond their lease term. Here we should consider the circumstances under which the tenant made this decision. The tenant testified that in the midst of a worldwide pandemic--the worst in a century--the Burlington Housing Authority was understandably unable to secure another unit for her in a timely manner. The petitioner relied on BHA to provide nearly 80% of the monthly rent to the landlord through its federal voucher program. COVID-19 clearly posed logistical, public health and financial issues for BHA, tenants and landlords across the city, state, and country. In fact, for these reasons, multiple jurisdictions temporarily banned evictions, late fees, rent increases and other forms of penalties. Many recognized the need for a home in which to quarantine.

The Board also ought to consider whether such an amount ("holdover rent" worth 100% of normal rent) is justified given the extent of damages arising out of the tenant's holdover status. The petitioner testified, without any dispute by the respondent, that the subsequent tenant came from within the same building, 316 Flynn Ave. She argued that because the tenant continued to rent their unit, and she continued to pay the normal rental rate for hers, the landlord suffered no financial damages. The majority has held that "holdover rent" is "rent" and can therefore be withheld from a tenant's security deposit. We respectfully disagree. Despite the landlord's choice of terms, the "holdover rent" or "rent escalation" cannot rightly be accepted as "rent" at all, but instead as a penalty used in a manner akin to the aforementioned "late fee." It is listed on the landlord's ledger as a separate line item ("holdover rent" being distinct from the normal rent). More than that, "holdover rent" is clearly a temporary amount, meant only to discourage a tenant from overstaying their lease. Not only did the subsequent tenant not pay $2230/month for the same unit, but the landlord, in calculating the proration for one day of rent in August for which the petitioner was responsible, used the prior rental rate of $1115. The security deposit amount itself is limited by ordinance to one month's rent.

We might look to another example of lease language in a case before the Board at its November 16, 2020 meeting. In *Wood and Farr v. JH2 Investments*, the rental agreement contains the following:

> "3. Rent. Tenant shall pay to Landlord as rent for the initial term of this Lease, **$1380** per month, to be paid and due on the first of the month. For the first month of January 2020, the rent shall be due at lease signing together with security deposit of $1,380 for a total amount of $2,760. If rent is received after the **6th** day of the month, the monthly rental installment shall be increased to $**1480 until such time as all amounts owed have been timely paid.**"

Here the landlord is calling "rent" what actually amounts to a late fee of $100 (or more). Were this amount to be withheld from a security deposit, Board precedent would suggest that we find such a deduction to be a wrongful withholding, *as it cannot rightly be considered "rent."*

Although presented in response to the landlord's deduction of a late fee, the petitioner's submission of the case *Highgate Associates, Ltd. v. Lorna Merryfield* is more relevant here than the majority may have contemplated. If what the landlord in this case (316 Flynn Ave LLC) has called "holdover rent" is really just a penalty in the same sense that the above landlord has dubbed his late payment penalty an increase in the "monthly rental installment," we should be able to evaluate whether the clause in this lease which allows for a "rent escalation" of 200% is appropriate or whether, like the late fee in *Highgate*, the "holdover rent" is an "unenforceable penalty." The Court used an established standard as described:

> We recently articulated three factors that should be considered in determining whether a contract provision is a reasonable liquidated damages clause rather than an unlawful penalty: [A] liquidated damages clause must meet three criteria to be upheld: (1) because of the nature or subject matter of the agreement, damages arising from a breach would be difficult to calculate accurately; (2) the sum fixed as liquidated damages must reflect a reasonable estimate of likely damages; and (3) the provision must be intended solely to compensate the non-breaching party and not as a penalty for breach or as an incentive to perform. (https://law.justia.com/cases/vermont/supreme-court/1991/op90-032.html)

In the matter before this Board, *Brazier v. 316 Flynn LLC (Redstone)*, we would conclude that:

- damages are, in fact, able to be calculated;

- based on the testimony provided, the sum of $1115 for "holdover rent" (let alone the $50 late fee) does not reflect a reasonable estimate of damages to the landlord; and, lastly,
- the sum seems to be intended as "a penalty for breach or as an incentive to perform."

Clearly, a uniform increase in rent to prevent holdover tenancies cannot be broadly applied to all circumstances, but more importantly cannot be applied to this particular circumstance. The landlord has not shown, or even attempted to estimate, damages as a result of the tenant remaining in her apartment for the 32 days beyond the term of their lease agreement. Indeed, she and the Burlington Housing Authority continued to pay rent in a timely manner in July. The standard lease language of a rent escalation for holdover tenancies, *no matter the circumstances*, seems to strongly suggest that the intent of the clause is to apply a penalty or use the threat of it as a significant incentive to leave at the end of the lease. It likewise implies a lack of correlation with the actual damages in particular and distinct cases, including this one. Because of the circumstances noted earlier, we find the amount of "holdover rent" to be an unenforceable penalty in the same vein as the landlord's standard $50 late fee, and thus, wrongfully withheld from the petitioner's security deposit.

Taken together, these findings would have required the respondent to return to the petitioner all but $35.97 for prorated rent in August, for a total security deposit return of **$1080.44**.

/s/ Patrick Murphy
Patrick Murphy

/s/ Betsy McGavisk
Betsy McGavisk

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of JOSHUA PRAWDZIK	**)**	
Regarding Withholding of Security Deposit by	**)**	**Security Deposit Appeal**
GREAT CEDARS LLP for Rental Unit at	**)**	
191 College Street, Apt. 308	**)**	

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on November 2, 2020; the hearing was held virtually via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Murphy, Olivia Pena, Betsy McGavisk and Charlie Gliserman were also present. Petitioner Joshua Prawdzik was present and testified. Respondent Great Cedar LLP was represented at the hearing by Mac Stevens who testified. Also appearing and testifying was Victoria White.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent Great Cedars LLP is the owner of a rental unit, 191 College Street, Apt. 308, in the City of Burlington which is the subject of these proceedings. Mac Stevens manages the property.

2. Petitioner Joshua Prawdzik moved into the rental unit with a written lease which ran from July 14, 2019 to June 30, 2020. Monthly rent was $1250.00.

3. Petitioner paid a security deposit of $1250.00 to respondent. Petitioner was to receive back his security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioner vacated the apartment on June 30, 2020 when the lease terminated.

5. On July 13, 2020, respondent sent a statement to petitioner in accordance with

ordinance requirements. Said statement indicated the entire deposit was being withheld for "no 30-day notice." Interest in the amount of $1.88 was credited to the deposit. Petitioner disputed the withholding of his deposit.

6. On May 26, 2020, petitioner called Kathy Parrott, another property manager for the property, and told her he was vacating the unit when the lease terminated. He asked if he was required to provide notice in writing and she replied no. Ms. Parrott indicated that she would make a note that he was vacating on June 30. Victoria White was in the room when petitioner spoke on the phone to Ms. Parrott and she collaborated petitioner's testimony. Mac Stevens testified that he did not receive any notice from petitioner; in addition, Ms. Parrott told him she did not receive any notice.

7. The lease does not require that a tenant provide notice of vacating when the lease terminates. In fact, the lease states that the tenant will surrender the premises to the landlord at the end of the term of the lease. Additionally, the hold over provision of the lease states, "Unless otherwise agreed by the parties in writing, there shall no holding over by LESSEE after the expiration of the term of the Agreement of Lease."

Conclusions of Law

8. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

9. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

10. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e). Proper notice was provided.

11. Section 18-120(c) of the Minimum Housing Code permits a landlord to retain all or part of the security deposit for the actual cost to repair damage beyond normal wear and tear which is attributable to the tenant in order to maintain the condition and habitability of the unit, for nonpayment of rent, for nonpayment of utility or other charges the tenant was required to pay, and for expenses required to remove from the rental unit articles abandoned by the tenant. The ordinance is specific about the reasons for withholding a deposit. Respondent withheld petitioner's deposit for "no 30-day notice." Not only was such notice not required under the lease (which terminated on the day petitioner vacated the unit), but a security deposit cannot be withheld for such a charge under the ordinance.

Order

Accordingly, it is hereby ORDERED:

12. Petitioner Joshua Prawdzik is entitled to recover from respondent Great Cedars LLP

the following amounts:

a) $1251.88, the principal amount of the deposit (including interest) improperly withheld after July 14, 2020; and

b) Additional interest of $0.008 per day from July 15, 2020 until such date as the amount improperly withheld is returned to petitioner.

DATED at Burlington, Vermont this 10th day of December, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara

/s/ Betsy McGavisk
Betsy McGavisk

/s/ Patrick Murphy
Patrick Murphy

/s/ Olivia Pena
Olivia Pena

/s/ Charlie Gliserman
Charlie Gliserman

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re:	**Request for Hearing of ALISON HALL** **Regarding Withholding of Security** **Deposit by JUNE LECLAIR for Rental** **Unit at 406 South Union St, Apt. 1**	**)** **) Security Deposit Appeal** **)** **)**

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on November 2, 2020; the hearing was held virtually via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Murphy, Olivia Pena, Betsy McGavisk and Charlie Gliserman were also present. Petitioner Alison Hall was present and testified. Respondent June LeClair was also present and testified. Also appearing and testifying was Sherry LeClair.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent June LeClair is the owner of a rental unit, 406 South Union Street, Apt. 1, in the City of Burlington which is the subject of these proceedings. Sherry LeClair helps manage the property.

2. Petitioner Alison Hall moved into the rental unit with a written lease which ran from July 1, 2019 to June 28, 2020. Monthly rent was $1100.00.

3. Petitioner paid a security deposit of $550.00 to respondent. Petitioner was to receive back her security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioner vacated the apartment on August 12, 2020.

5. On August 13, 2020, Sherry LeClair texted petitioner and informed her that the apartment needed to be cleaned. Ms. LeClair told petitioner the charge would be deducted from

her security deposit. She estimated the charge would be about $150.00.

6. On August 20, 2020, respondent sent a check in the amount of $385.00 to petitioner at the address provided by her[1], withholding $165.00 for cleaning. Respondent included a copy of the invoice for cleaning with the check. Respondent did not send an itemized statement of deductions with the check; in addition, respondent did not provide notice to petitioner of the right to appeal the withholding of the deposit to this Board. Petitioner did not receive the check sent to her.

7. On August 27, 2020, petitioner texted Sherry LeClair inquiring about her deposit. Ms. LeClair responded that respondent had sent the check along with the cleaning invoice of $165.00 to her. Ms. LeClair indicated she thought the letter should be in petitioner's mail that day or the next.

8. On August 28, 2020, petitioner sent respondent a letter requesting the full return of her deposit as respondent forfeited the right to withhold it by her failure to return the deposit within 14 days and for failing to send an itemized statement of deductions. Petitioner indicated if the deposit was not returned in full by September 4, she would file a request for hearing before this Board. Petitioner filed her request on September 1, 2020.

9. Petitioner argued that the failure to return the deposit was willful. The basis of her argument is that the check was sent to the incorrect address and that the deposit wasn't returned even after petitioner informed her that she forfeited the deposit under state law. Respondent and Sherry LeClair denied that the deposit was willfully withheld. Sherry LeClair and respondent testified that a check was sent and they don't know what happened to it. (Petitioner confirmed that she did not give respondent her complete mailing address.) Sherry LeClair also testified that

[1] When petitioner provided her mailing address to respondent she did not include her apartment number.

she thought she provided petitioner with a good understanding of what was happening with the deposit – how much was being withheld and why.

Conclusions of Law

10. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

11. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

12. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e).

13. A landlord who decides to retain all or part of a security deposit must comply with 3 specific requirements of the ordinance: the deposit must be returned within 14 days of the date the tenant vacated or abandoned the rental unit with a written statement itemizing any

deductions; the statement must contain notice of the tenant's right to appeal to the Housing Board of Review; and the statement must be hand-delivered or sent by certified mail.[2] See *Lieberman v. Circe*, No. S21-13 Cncv (Crawford, J., March 27, 2013) and Minimum Housing Code Sec. 18-120(c). The Vermont Supreme Court required the literal enforcement of these requirements in *In re Soon Kwon*, 189 Vt 598 (2011). Accordingly, a landlord who fails to meet all of these requirements forfeits the security deposit. In this case, respondent failed to comply with the notice requirements by failing to send an itemized list of deductions from the deposit, by failing to include petitioner's appeal rights in a statement and by failing to return the deposit within 14 days of the vacate date. Therefore, the Board concludes respondent forfeited the right to withhold any part of the deposit.

14. Petitioner argued that the deposit was willfully withheld. Sec. 18-120 of the Minimum Housing Code provides that if the failure to return a deposit with an itemized statement is willful, the landlord is liable for double the amount wrongfully withheld. Petitioner argued that respondent's failure to return the deposit after being informed that she hadn't received it, as well as sending the deposit to the incorrect address, demonstrated the willful withholding of the deposit. The Board concludes there is no evidence to support that the deposit was willfully withheld: respondent sent a check to the address provided by petitioner. Although the check was never received, they don't know what happened to it. In addition, Sherry LeClair was responsive to petitioner's text messages and kept her updated about the deposit.

15. Petitioner is entitled to recover interest on the security deposit. Minimum Housing Code Sec. 18-120(c). The Housing Code requires that the security deposit be held by the owner in an interest-bearing account with an interest rate equivalent to a current Vermont bank

[2]An amendment to Sec. 18-120(c) removing the "certified mail" requirement took effect on January 7, 2015.

passbook savings account. Sec. 18-120(a). The Board applies the interest rate currently found in most bank passbook savings accounts – 0.25% simple annual interest.

Order

Accordingly, it is hereby ORDERED:

16. Petitioner Alison Hall is entitled to recover from respondent June LeClair the following amounts:

a) $550.00 of the principal amount of the deposit improperly withheld after August 26, 2020;

b) Interest in the amount of $1.46 on the entire deposit for the period August 2, 2019 to August 26, 2020; and

c) Additional interest of $0.004 per day from August 27, 2020 until such date as the amount improperly withheld is returned to petitioner.

DATED at Burlington, Vermont this 10th day of December, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara

/s/ Betsy McGavisk
Betsy McGavisk

/s/ Patrick Murphy
Patrick Murphy

/s/ Olivia Pena
Olivia Pena

/s/ Charlie Gliserman
Charlie Gliserman

Dissent in *Brazier v. 316 Flynn LLC (Redstone)*

1. The dissent begins by noting what has been omitted from the majority decision in its "Findings of Fact." – namely, the several charges that the respondent in this case applied as deductions from the petitioner's security deposit. These are difficult to parse out because of the respondent's lack of clarity and precision in setting out its accounting in its security deposit transmittal, but they are as follows:

	Charge	Amount
1	"Holdover rent" for July 2020 (which is the equivalent of 50% of the amount of the holdover amount set out in the contract (which is double the amount (200% of) the rent paid by the tenant on a monthly basis over the preceding 12 month rental term), the other 50% of which the tenant paid in a timely manner in July 2020)	$1,115.00
2	"Late fee" for July 2020 (invoked by respondent as a result of petitioner's having paid her usual monthly rent amount but not the full holdover charge)	$50.00
3	Pro-rated rent for single day in August (Aug 1st). Respondent invoiced for the entire month + late fee, but credited back 30 days and the late fee. This "rent" was calculated at the normal rental rate of $1115.	$35.97
4	Cleaning fee	$150.00
5	Carpet cleaning fee	$125.00
6	Painting fee	$100.00
7	Damage fee for burnt outlet and hole in door (Respondent submitted invoice of $135 for the outlet, but no invoice for the door.)	$275.00
Total charges assessed by respondent		**$1,850.97**
(Less petitioner's security deposit applied by respondent against its total charges claimed)		**-$1,116.41**
Total charges claimed by respondent as "balance due to landlord" after applying petitioner's security deposit		**$734.56**

As set out above, the total damages assessed by the respondent were therefore **$1,850.97**, to which the respondent applied the petitioner's security deposit with interest ($1,116.41) resulting in the respondent's assessment upon the tenant of a "balance due to landlord" of **$734.56**.

Notably omitted from these calculations by the respondent is the interest accrued on the security deposit to which tenants are entitled as a matter of law.

2. It is important to set out and consider the above charges claimed by the respondent because even if the deduction for "holdover rent" were upheld as permissible—the dissent contends that it is not--the majority should have assessed the validity of each of these charges. Such an assessment of the charges claimed by the respondent is relevant not only because the holdover rent is an invalid liquidated damages clause but also because the respondent has issued the petitioner with a bill in the sum of $734.56 in respect of items

in the chart above that exceed the sum of the security deposit. If none of the charges that the respondent has claimed were deemed legitimate deductions, the respondent would be entitled to at least the interest on her security deposit. The dissent will therefore first address the question of the various "damages," before returning to the most critical issue of "holdover rent." [see note below]

3. Clause 5 of the rental agreement signed by the parties (the petitioner and the respondent) in April 2018 (the "rental agreement") sets out the items against which the respondent may apply the tenant's security deposit. Amongst these items is "damages to the Premises unless the damage is the result of normal wear and tear". Similarly, Vermont state law (*see* 9 V.S.A. § 4461(b)(2)) provides that, "damage to property of the landlord, unless the damage is the result of normal wear and tear or the result of actions or events beyond the control of the tenant". The charges set out in the chart above numbered 3 through 7 are what the respondent purports to be such "damages". However, the respondent has failed to set out any valid argument as to why these fees ought to be regarded as more than mere "wear and tear" of the residential property. In *Mongeon Bay Properties, LLC v. Mallets Bay Homeowner's Ass'n*, the Vermont Supreme Court set out a three-part test for determining whether damages to a property may be considered "wear and tear". The Court explained that the criteria of the three-part test include: 1) whether the tenant made reasonable use of the property; 2) the type of property, as well at its context and use; and 3) whether the tenant took reasonable steps to avoid damage to the property. 2016 VT 64, ¶¶ 32-37, 202 Vt. 434, 149 A.3d 940. Based upon the evidence provided by the respondent in this case, the dissent finds the deductions for "cleaning," "carpet cleaning," and "painting" to be unwarranted. Scuff marks and a couple of tacks/minor holes do not rise above the standard of "normal wear and tear." Indeed, a painting invoice which included the tenant's unit among many others suggests that these expenses are routine and to be expected as a landlord's cost of doing business. The landlord also failed to demonstrate how the damage for the "burnt outlet" was caused by the tenant's negligent use of the premises, and neither an invoice nor an explanation was provided in respect of the "hole in door." To the contrary, the tenant submitted evidence documenting several issues shared by other tenants with the development itself, as well as her move-in checklist which noted paint on the door and other marks within the apartment. The dissent finds these deductions ($135 for the outlet, and what can only be assumed as $140 for the door) to be unreasonable.

4. In communications submitted to the Board as evidence, the petitioner does acknowledge that she was not able to move out at the end of July 2020, instead handing over possession of the unit on August 1, 2020. For this one day, the respondent has prorated rent for the month of August to $35.97, or 1/31 of the rental rate of $1115. The dissent finds this withholding to be reasonable. The dissent notes that it is inconsistent with the respondent's contention that the monthly rent during July and August should have been calculated at 200% or double the rate of $1115.

5. Lastly, the dissent considers the two charges from July--"holdover rent" of $1115 and a "late fee" of $50--and whether they are permissible deductions from the tenant's security deposit. We consider these items (items 1 and 2 respectively in the chart set out above) to be invalid liquidated damages clauses. Recently, this Board held that a late fee is not an allowable deduction, as Section 18-120(c) of Burlington's Minimum Housing Code is clear on what the landlord can withhold: "After the rental unit is vacated or abandoned by the tenant(s), the owner may retain all or part of the deposit plus interest for the actual cost to repair damage beyond normal wear and tear which is attributable to the tenant in order to maintain the condition and habitability of the unit, for nonpayment of rent, for nonpayment of utility or other charges which the tenant

was required to pay directly to the landlord or to a utility, and for expenses required to remove from the rental unit articles abandoned by the tenant." Particularly in this case, where the late fee is linked to the "holdover rent" charge, the dissent finds the amount of the late fee to be wrongfully withheld.

6. It is a fact that the tenant stayed in the apartment a month and one day beyond the term of her lease. It is also a fact that the lease includes language which provides for a $50 late fee, as well as a "rent escalation" of 200% if a tenant stays beyond their lease term. Here we should consider the circumstances under which the tenant made this decision. The tenant testified that in the midst of a worldwide pandemic--the worst in a century--the Burlington Housing Authority was understandably unable to secure another unit for her in a timely manner. The petitioner relied on BHA to provide nearly 80% of the monthly rent to the landlord through its federal voucher program. COVID-19 clearly posed logistical, public health and financial issues for BHA, tenants and landlords across the city, state, and country. In fact, for these reasons, multiple jurisdictions temporarily banned evictions, late fees, rent increases and other forms of penalties. Many recognized the need for a home in which to quarantine.

7. The Board also ought to consider whether such an amount ("holdover rent" worth 100% of normal rent) is justified given the extent of damages arising out of the tenant's holdover status. The petitioner testified, without any dispute by the respondent, that the subsequent tenant came from within the same building, 316 Flynn Ave. Brazier argued that because the incoming tenant continued to rent their unit from Redstone, and Brazier continued to pay the normal rental rate for hers, the landlord suffered no financial damages. The majority has held that "holdover rent" is "rent" and can therefore be withheld from a tenant's security deposit. We respectfully disagree. Despite the landlord's choice of terms, the "holdover rent" or "rent escalation" cannot rightly be accepted as "rent" at all, but instead as a penalty used in a manner akin to the aforementioned "late fee." It is listed on the landlord's ledger as a separate line item ("holdover rent" being distinct from the normal rent). More than that, "holdover rent" is clearly a temporary amount, meant only to discourage a tenant from overstaying their lease. Not only did the subsequent tenant not pay $2230/month for the same unit, but the landlord, in calculating the proration for one day of rent in August for which the petitioner was responsible, used the prior rental rate of $1115. The security deposit amount itself is limited by ordinance to one month's rent.

We might look to another example of lease language in a case before the Board at its November 16, 2020 meeting. In *Wood and Farr v. JH@ Investments* the rental agreement contains the following:

> "3. Rent. Tenant shall pay to Landlord as rent for the initial term of this Lease, **$1380** per month, to be paid and due on the first of the month. For the first month of January 2020, the rent shall be due at lease signing together with security deposit of $1,380 for a total amount of $2,760. If rent is received after the **6th** day of the month, the monthly rental installment shall be increased to $**1480 until such time as all amounts owed have been timely paid**."

Here the landlord is calling "rent" what actually amounts to a late fee of $100 (or more). Were this amount to be withheld from a security deposit, Board precedent would suggest that we find such a deduction to be a wrongful withholding, *as it cannot rightly be considered "rent."*

8. Although presented in response to the landlord's deduction of a late fee, the petitioner's submission of the case *Highgate Associates, Ltd. v. Lorna Merryfield* is more relevant here than the majority may have

contemplated. If what the landlord in this case (316 Flynn Ave LLC) has called "holdover rent" is really just a penalty in the same sense that the above landlord has dubbed his late payment penalty an increase in the "monthly rental installment," we should be able to evaluate whether the clause in this lease which allows for a "rent escalation" of 200% is appropriate or whether, like the late fee in *Highgate*, the "holdover rent" is an "unenforceable penalty." The Court used an established standard as described:

> "We recently articulated three factors that should be considered in determining whether a contract provision is a reasonable liquidated damages clause rather than an unlawful penalty:
>
> > [A] liquidated damages clause must meet three criteria to be upheld: (1) because of the nature or subject matter of the agreement, damages arising from a breach would be difficult to calculate accurately; (2) the sum fixed as liquidated damages must reflect a reasonable estimate of likely damages; and (3) the provision must be intended solely to compensate the non-breaching party and not as a penalty for breach or as an incentive to perform."
> > (https://law.justia.com/cases/vermont/supreme-court/1991/op90-032.html)

In the matter before this Board, *Brazier v. 316 Flynn LLC (Redstone),* I would conclude that damages are, in fact, able to be calculated, that based on the testimony provided, the sum of $1115 for "holdover rent" (let alone the $50 late fee) does not reflect a reasonable estimate of damages to the landlord, and lastly, that the sum seems to be intended as "a penalty for breach or as an incentive to perform." Clearly a uniform increase in rent to prevent holdover tenancies cannot be broadly applied to all circumstances, but more importantly cannot be applied to this particular circumstance. The landlord has not shown or even attempted to estimate damages from the tenant remaining in her apartment for the 32 days beyond the term of their lease agreement. Indeed, she and the Burlington Housing Authority continued to pay rent in a timely manner in July. The standard lease language of a rent escalation for holdover tenancies, *no matter the circumstances*, seems to strongly suggest that the intent of the clause is to apply a penalty or use the threat of it as a significant incentive to leave at the end of the lease. It likewise implies a lack of correlation with the actual damages in particular and distinct cases, including this one. Because of the circumstances noted earlier, the dissent finds the amount of "holdover rent" to be an unenforceable penalty in the same vein as the landlord's standard $50 late fee, and thus wrongfully withheld from the petitioner's security deposit.

9. The majority has further argued that *Highgate Associates, Ltd. v. Lorna Merryfield* does not apply in this case because "although the Tenant here may have breached her month-to-month hold-over lease by nonpayment of rent, she did not breach the immediately-preceding lease agreement, where one finds the 200% rent clause." However, this seems to imply the existence of two separate leases rather than one whose terms have been breached. Further, the majority argues that "presumably, in exchange for increased rent, the Landlord has forgone the power to terminate the lease in 14 days and the right to sue for ejectment, which can have profoundly negative effects on a tenant." Yet, in subsection (a) *i.* of the lease section 18, Default; Damages; Attorney's Fees," the Respondent had maintained its ability to provide "Fourteen (14) days written notice to Tenant to vacate the Premises." The dissent further notes the extreme imbalance of bargaining power between a major commercial landlord and a tenant who relies on federal housing subsidies through the Burlington Housing Authority to be able to secure a housing unit in an oligopolistic private housing market. Just as the petitioner in this case faced a dire choice in June/July 2020 of whether to holdover or become homeless during a pandemic, the petitioner likely faced a similar choice at the start of her tenancy—whether to accept the complex fine print offered in the lease by the respondent or to look

elsewhere in a local market with few alternatives for a tenant in the petitioner's position. This imbalance of bargaining power is another key consideration in whether a particular clause constitutes an unenforceable penalty. Here it should.

10. As one delves more deeply into the language of the lease in this case, a clear pattern emerges of the respondent attempting to comply with the letter of the law without having to comply with its intent, and where possible, to pass the costs of landlordism onto the tenant. In some instances, this seems to result in clauses included which actually appear to be in conflict with the law. For example, section 4 "Late Payments; Returned Checks" establishes a late fee of $50 for late payments after the fifth (5th) day of the month, despite case law discussed earlier in this dissent which seems to rule against such clauses. In the lease, the respondent considers this late fee "additional rent."

Section 5 "Security Deposit" goes beyond municipal ordinance and state law defining the four (4) categories of what can be appropriately withheld from a security deposit with an additional one "(e) any cleaning expenses." The Board has found in prior cases with this and other respondents that cleaning charges cannot automatically be deducted from the security deposit without first establishing that those charges were incurred because of damage exceeding the "normal wear and tear" standard. The addendum to this lease "Security Deposit Refunds" elaborates on the respondent's own requirements for tenants to complete before receiving their legally due security deposit. Many items appear to be in conflict with the Board's established precedent of evaluating the validity of claims against a tenant's security deposit.

Section 7 "Conversion to a Condominium" is written to serve as notice to the petitioner (and any tenant) that "the Landlord may, at its discretion, convert the Property, including the Leased Premises, from apartments to condominium units" while depriving the same of "the benefit of the notice provisions, purchase options, payment of relocation expenses, or any other provisions, rights, benefits or features of federal, state or municipal law related the conversion of apartment units to condominium units…" This language has been included despite Vermont state law which states that "No rental agreement shall contain any provision which attempts to circumvent or circumvents obligations and remedies established by this chapter and any such provision shall be unenforceable and void." (9 V.S.A § 4454) While not relevant to this particular case, the inclusion of this language demonstrates the respondent's intention to circumvent local ordinances and state statutes.

Burlington ordinance and Vermont state law have placed clear limitations on what can be withheld from a tenant's security deposit. In their lease, the respondent seems at pains to fit any possible charge into permissible deduction categories—whether including as "additional rent" late fees, *any* cleaning charge or or "all court costs and attorney's fees incurred by Landlord or Manager to enforce by legal action or otherwise, any of the Landlord's or Manager's rights hereunder including, without limitation, the costs of collecting rent, including holdover rent, and the costs of appearing before the Housing Board of Review or comparable regulatory agency when necessary." This broad conception of "rent" contradicts the Board's own established precedent when applying Burlington's ordinance governing security deposits, and would allow landlords to devise similar clauses disguising an array of penalties and fees in the language of "rent," "additional rent," or "rent escalation." The dissent finds acceptance of this overly broad application of the term "rent" to be untenable, and much more than "unseemly" given the particular circumstances of the petitioner, the relative bargaining power of the respondent, and the gravity of the public health and economic risks posed by the COVID-19 pandemic.

Taken together, these findings would have required the respondent to return to the petitioner all but $35.97 for prorated rent in August, for a total security deposit return of **$1080.44**.

/s/ Patrick Murphy
Patrick Murphy

/s/ Betsy McGavisk
Betsy McGavisk